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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 77-3621

RANDALL ROBINSON - - - - **Petitioner**

versus

COMMONWEALTH OF KENTUCKY - **Respondent**

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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September ____, 1977

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October Term, 1976

No. _____

RANDALL ROBINSON - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, RANDALL ROBINSON, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Kentucky entered in this proceeding on February 18, 1977.

OPINION BELOW

The opinion of the Supreme Court of Kentucky, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Henry Circuit Court.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on February 18, 1977. A timely petition for rehearing was denied on June 10, 1977, and this

petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the search warrant was rendered invalid for lack of probable cause where the allegations in the supporting affidavit establishing the credibility and reliability of the informant were false and where the supporting affidavit did not otherwise contain independent facts sufficient to corroborate the informant's reliability and credibility?

2. Whether the defendant was denied a fair trial where the prosecutor in his closing argument made prejudicial statements that went beyond reasonable comment upon the evidence and reasonable inferences therefrom, made expressions of personal belief as to the credibility of witnesses, made appeals to the passion and prejudice of the jury, and injected into the proceedings extraneous matters designed to draw the attention of the jury from the real issues?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty or property, without due process of law.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

Kentucky Revised Statute 433.120 provides as follows:

> (1) Any person guilty of robbery or burglary shall be confined in the penitentiary for not less than two nor more than ten years.
>
> (2) Any person who has possession of any tools, implements or other things used by burglars for housebreaking, forcing doors, windows, locks or buildings or other places where goods, wares, merchandise or money is kept, with the intention of using them burglariously shall be confined in the penitentiary for not less than two nor more than ten years.

Kentucky Revised Statute 433.290 provides as follows:

> Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing

it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section.

Kentucky Revised Statute 433.640 provides as follows:

(1) Any person who, for the purpose of defrauding another, cuts off, erases, defaces or in any manner removes or alters any serial number placed, by the manufacturer, on the motor or chassis of a motor vehicle or farm tractor shall be confined in the penitentiary for not less than one year nor more than five years.

(2) The ownership, possession or control of a motor vehicle or farm tractor on which any motor or chassis serial number has been altered, defaced or removed, shall be prima facie evidence that the altering, defacing or removing was done by the person owning, possessing or having control of the motor vehicle or farm tractor.

STATEMENT OF THE CASE

The Petitioner, RANDALL ROBINSON, was charged in fifteen (15) indictments by the Henry County Grand Jury numbering 19-CR-75 through 33-CR-75, inclusive. The indictments included charges of (1) knowingly receiving stolen property—KRS 433.290; (2) defacing or altering farm tractor serial numbers—KRS 433.640; and (3) possession of burglary tools—KRS 433.120.

Petitioner was convicted by a jury on October 24, 1975 in the Henry Circuit Court. On October 29, 1975, the Petitioner filed a motion for a new trial with the Henry Circuit Court. This motion was denied on November 13, 1975. Petitioner appealed the conviction to the Supreme Court of Kentucky. On appeal three errors were raised, two of which form the basis of this Petition for Writ of Certiorari. These errors involved the invalidity of the search warrant, improper argument by the prosecutor and the failure of the trial court to properly instruct the jury.

The order and opinion of the Supreme Court of Kentucky affirming Petitioner's conviction is not lengthy. (Appendix A.) A timely Petition for Rehearing was denied. (Appendix B.)

Briefly stated, the facts are that on or about September 30, 1974, a semi-trailer load of auto parts was stolen from the NAPA Distribution Center in Louisville, Jefferson County, Kentucky. An informant related to the Louisville Police Department that the stolen parts could be found on the property of the Petitioner in Henry County, Kentucky. On November 8, 1974, the Louisville Police Department relayed this information to the Kentucky State Police who, in applying for a search warrant, falsely alleged that in the past the informant had given to the Louisville Police Department information which had resulted in the arrest and conviction of persons for the commission of other crimes. (Appendix C.) A warrant was issued on the basis of this affidavit (Appendix D) and the search of the property revealed stolen motor vehicles,

farm equipment, auto parts and other related articles. The Petitioner was then arrested and in due course brought to trial. Petitioner's motion to suppress evidence from the search was denied.

During closing arguments, the prosecutor made numerous statements which were prejudicial to the Petitioner's case. The prosecutor stated without support that various witnesses had been, or would in the future be, threatened by the Petitioner. The prosecutor made expressions as to his personal belief in the credibility and truthfulness of a key prosecution witness and his testimony. Also, the prosecutor appealed to the prejudice of the jury by labeling the Petitioner as an outsider who had moved his operation to Henry County where he could fool the local people and who was now trying to fool the local jury as well.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Supreme Court of Kentucky Demonstrates a Disturbing Misunderstanding By That Court With Regard to the Establishment of Probable Cause By the Use of Confidential Informants Which Could and Should Be Corrected By a Decision of This Court.

This Court, with its holdings in *Aguilar* v. *Texas,* 378 U. S. 108 (1964) and *Spinelli* v. *United States,* 393 U. S. 410 (1969), made clear that the use of confidential informants to establish probable cause for search warrants is subject to certain safeguards meant to insure that these hearsay allegations of the informant represent more than mere belief or suspicion.

Thus, in order to establish probable cause by the use of an informant, the affiant must (1) present some of the underlying circumstances from which the informant concluded that the thing to be seized was where he claimed it was, and (2) present some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable. It is further made clear that the informant's allegations may be corroborated by independent sources and thereby be rendered sufficiently reliable for establishing probable cause.

An examination of the search warrant affidavit and the opinion of the Supreme Court of Kentucky in this case reveals how the Kentucky court has either failed to apply or has misapplied the rules as established by the decisions of this court. First, however, it must be noted that in Kentucky it is the rule that the determination of probable cause is limited to the four corners of the affidavit. *Bowen* v. *Commonwealth,* Ky., 251 S. W. 2d 625 (1923); *Caslin* v. *Commonwealth,* Ky., 491 S. W. 2d 832, 834 (1973). The Kentucky Supreme Court in this case reaffirmed this rule. The affidavit in this case nowhere provides any of the underlying circumstances from which the informant concluded that the things to be seized were where he claimed they were. The affidavit did present some underlying circumstances from which the affiant concluded that the informant was reliable, however, these allegations were all untrue. During the course of the trial, two witnesses testified as to the falsity of the allegation that the informant had given information

to the Louisville Police Department prior to this occasion. During the testimony of Sergeant David Vincel of the Louisville Police Department, the following exchange took place:

Q. Sergeant, would it be correct to say the first contact you had with Mr. Kruer was on October 15, 1975?

A. No, that wouldn't be right. It was on October 10, I believe.

Q. Well, I may have written it down wrong. I thought you said the 15th.

A. That's the time I started the surveillance of . . .

Q. October 10. Right, Sergeant?

A. Yes, sir.

Q. And I am assuming that between October 10 and November 8, this informant gave you information about other persons. Is that correct?

A. I don't know what you mean, other persons.

Q. He told you to go out and arrest other people who were committing offenses, didn't he?

A. No, sir. We were involved in this one case. This auto theft ring.

Q. Let me ask you this then. Were any arrests made between October 10 and November 8, 1975, from information that Kruer gave you or the other members of the department in your presence which led to a conviction?

A. No. The 8th is the night we served the search warrant.

Q. I understand.

A. And from that point on is when all arrests were made in connection to this ring.

Q. So no persons have ever been arrested or convicted for other crimes other than the people you are interested in, Mr. Robinson, from information which was received from Mr. Kruer?

A. Were other people arrested?

Q. Yes, sir. Between October 10 and November 8.

A. Nobody was arrested. [T.E., Vol. III, pp. 364-365.]

Lieutenant Larry Ogle of the Louisville Police Department testified to the same effect:

Q. How many other people besides the defendant Robinson had been arrested as a result of information given to you by Mr. Kruer between the dates of October 10 and November 8, 1974? . . .

A. Just Mr. Robinson. [T.E., Vol. III, p. 384.]

Q. Did anyone from the Louisville Police Department working under your control give information as a result of the information received from Mr. Kruer, lead to the arrest and conviction of other persons for commission of other crimes between 10-10 and November 8, 1974. Can you name any other people that were arrested and convicted in that period?

A. Just Mr. Robinson is the only one convicted. The other one got a hung jury I think.

Q. Well, during that period I'm talking about?

A. Not to my knowledge, no, sir.

Q. Nobody, is that correct?

A. Yes, sir. [T.E., Vol. III, p. 386.]

Earlier, during the pre-trial conference, trial counsel for Petitioner entered for the record testimony of the informant, Brian Kruer:

> Mr. Kaplan: Page 59, sir, line 14.
>
> Q. You have not been an informer all your years, have you? A. No, sir. Q: In fact, sir, this is the first time you have operated as an informer? A: Yes, sir.
>
> On page 60, line 7. Q: Is this the first time you had turned informant? A: Yes it is. . . .
>
> . . . On Page 63, line 19. Q: Is this the first time you have ever been an informant, this particular circumstance, in your giving information on Randy Robinson and Willie Houk in that two week period? So your entire informant career started approximately two weeks prior to the search warrant? A: It started on October the 9th.
>
> On page 64, the same text, line 9, well line 5. Q: At no time between October the 9th and November the 8th or 9th, the date the search warrant was, was anyone ever arrested because of information that you had given, is that right? A: That's right. Line 10. Q: Your informing had never led to an arrest prior to the search warrant? A: That's correct. [T.E., Pre-Trial Conference, pp. 5-6.]

Thus, it should be clear that the informant had not, in fact, given any information in the past, much less information resulting in arrests and convictions, and therefore, the informant has not been proven reliable. As a result, the affidavit here fails both parts of the test set forth by this Court in *Aguilar* and *Spinelli,*

and the search warrant should therefore have been invalidated.

The trial record reveals that the police had accumulated substantial evidence corroborative of the allegations of the informant, but this information was never placed in the affidavit for the search warrant and therefore was never properly considered by the issuing magistrate. The Supreme Court of Kentucky, dismissing the relevance of the shortcomings and falsehoods in the affidavit, ruled that the warrant was valid, stating:

> There is still another reason why the warrant should not have been quashed. The affidavit contained more than three legal-size pages of information. The officer's cause for believing that the stolen property was in the appellant's premises was not confined to what he had heard that the informant had told the Louisville Police. Among other things disclosed by the affidavit, the place had been under surveillance, and the officer had seen "pictures of the stolen property in the barns and homes abovedescribed," etc. From a stem-to-stern reading of the affidavit it is our opinion that it would have provided probable cause for the warrant without the details attributed to the informant. . . . [Appendix A, p. 29.]

The extent of the corroborative, and supposedly independent, evidence in the affidavit is found in two sentences:

> The affiant with other officers has had the semi-trailer and the property on which it is located under surveillance for a period of time. . . .

> . . . The affiant has seen the van and has seen pictures of the stolen property in the barn and house above described. . . . [Appendix C, pp. 33-34.]

Nowhere did the affidavit relate how it is concluded that this "van" is the stolen semi-trailer. In fact, the testimony of Officer Chisholm of the Kentucky State Police was to the effect that what was on the Petitioner's property was not a semi-trailer, but a "family trailer type van." [T.E., Vol. II, p. 259.]

Nowhere does the affidavit explain about these pictures of the stolen property. It does not mention who took the pictures, how the pictures were taken, when the pictures were taken, or where the pictures were taken. In fact, the pictures had been taken by the informant with a camera and film provided by the Louisville Police Department for that purpose. Also, the Louisville Police Department developed the film and printed the pictures. At trial, the informant Brian Kruer testified to this effect.

> A. . . . Nearly every day, I was in contact with Larry Ogle.
>
> Q. All right did Lieutenant Ogle give you any camera or tape recorders or any thing?
>
> A. He gave me a camera and a tape recorder to record information I needed and pictures I had taken. . . .
>
> Q. And did you take any pictures of the Robinson farm?
>
> A. I certainly did. Several of them. [T.E., Vol. IV, p. 530.]

> Q. Did you turn those pictures over to the police?
>
> A. I didn't turn the pictures over to them. I turned the film over to them and they, in turn, had them developed and presented them to their officials.
>
> Q. Did Randy Robinson ever find you or hear you or see you or suspect you were on the farm when you took these pictures?
>
> A. I don't think so. I am sure he didn't suspect me being there but then he might have. I had no way of knowing because I didn't ask him.
>
> Q. Did you nearly get caught or anything?
>
> A. Yeah. He walked the lane the night I was there laying in the mud beside the barn. [T.E., Vol. IV, p. 531.]

Lieutenant Ogle's testimony confirmed this.

> A. I worked with Kruer for approximately 30 days and I had daily contact with him in person. A few days he just called me. I purchased a small tape recorder for Mr. Kruer and supplied him with tapes. He had various conversations with Mr. Robinson. . . .
>
> Q. O.K. Did you buy Mr. Kruer a camera?
>
> A. Yes, sir, I did.
>
> Q. Did Mr. Kruer take any pictures on the Randy Robinson farm?
>
> A. Yes, sir, he did.
>
> Q. And did he take any pictures of any stolen property on the Randy Robinson farm?
>
> A. Yes, sir, he did. [T.E., Vol. III, pp. 374-375.]

It is clear that the Fourth Amendment does not apply to a search by a private person acting on his

own. *Bordeau* v. *McDowell,* 256 U. S. 465, 475 (1921). It is equally clear, however, that where a private individual works in concert with or with the assistance of the police, his search is no longer considered to have been conducted by a private individual, but rather is considered to have been conducted by an agent of the police. Therefore, any such search is subject to the requirements of the Fourth Amendment. *Bordeau* v. *McDowell, supra,* 256 U. S. at 475; *Lustig* v. *United States,* 338 U. S. 74, 78-79 (1949); *United States* v. *Lamar,* 545 F. 2d 488 490 (5th Cir. 1977); *United States* v. *Sherwin,* 539 F. 2d 1, 5-6 (9th Cir. 1976). Thus, as the picture-taking expedition itself amounted to an illegal search that should have in and of itself, invalidated the later search as "fruit of the poisonous tree," *Nardone* v. *United States,* 308 U. S. 338, 340-342 (1939), *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 391-392 (1920), the pictures cannot constitutionally be the basis for a finding of probable cause for a search warrant, nor be corroboration for the statements of the unproven informant.

Also, the mere fact of surveillance does not provide probable cause for a search. Clearly, the Kentucky Supreme Court was impressed with the length of the affidavit, but length alone is not sufficient to establish probable cause for a search. The fact remains that the affidavit does not relate that the surveillance revealed anything that constitutes probable cause for a search. Such conclusory allegations, devoid of any underlying factual observations, are not sufficient to support a finding of probable cause, especially

when it is considered that at no time in this case did there exist exigent circumstances making a thorough warrant request impractical.

Here it appears that the issuing magistrate and the Supreme Court of Kentucky have merely acted as the "rubber stamp for the police" condemned in *United States* v. *Ventresca,* 380 U. S. 102, 109 (1965). It is important that this Court invalidate this search in order that such incomplete affidavits and improper police procedures do not become commonplace. The use of falsehoods in affidavits, searches by private persons in concert with the police and a casual approach to search warrant affidavits cannot be condoned. Especially important is the proper treatment of the search warrant affidavit. Seach warrant affidavits have a vital function in that they preserve the factual basis upon which the warrant is issued and compel the investigating officer to articulate substantiated facts rather than mere suspecions.

Invalidating the search warrant in this case would be consistent with the effectuation of the deterrent purpose of the exclusionary rule most recently reasserted in *Stone* v. *Powell,* —— U. S. ——, 96 S. Ct. 3037, 3048 (1976).

2. A Decision By This Court On the Effect of False Material Allegations in a Search Warrant Affidavit Would Settle the Conflict That Exists Among Both State and Federal Courts.

The search which produced the evidence for this case was conducted pursuant to a warrant issued by the Henry Quarterly Court. The affidavit for the search warrant was made by an officer with the Kentucky State Police who alleged, among other things, that the informant providing most of the information for the affidavit had been proven reliable by having previously given to the Louisville Police information leading to the arrest and conviction of persons for other crimes. This allegation was relied upon to support the credibility and reliability of the informant.

At and before trial it was revealed, however, that this statement was untrue. In fact, this investigation marked the first occasion that the Louisville Police had had contact with this informant. [Testimony of Lieutenant Ogle and Brian Kruer, T.E., Vol. III, pp. 364-365, 384; T.E., Pre-Trial Conference, pp. 5-6, quoted *supra.*]

Although this Court has not yet ruled whether a search warrant and its supporting affidavit, adequate on their face, may later be impeached [*Rugendorf* v. *United States,* 376 U. S. 528, 531-532 (1964)], most courts, both state and federal, have proceeded to go behind the search warrant and affidavit to impeach the finding of probable cause upon an initial showing of misrepresentation in the affidavit in order to fully effectuate the requirements of the Fourth Amendment.

Nearly all of the Federal Circuit Courts of Appeal have ruled in favor of this examination of the affidavit (see below), but their treatment of misstatements found therein has varied. It is this varied treatment of misstatements in search warrant affidavits that presents a proper case for examination and review by this Court in order that the requirements of the Fourth Amendment in this area can be clarified.

The Courts of Appeal have split basically three ways in their treatment of misrepresentations or misstatements in affidavits. The first approach is found in decisions in the Fifth and Tenth Circuits. *United States* v. *Thomas,* 489 F. 2d 664, 669 (5th Cir. 1973), recently followed in *United States* v. *Park,* 531 F. 2d 754, 758-759 (5th Cir. 1976); *United States* v. *Harwood,* 470 F. 2d 322, 325 (10th Cir. 1972). Basically, these decisions provide that search warrant affidavits will be invalidated where (1) the misrepresentation was intentionally made regardless of the materiality of the misrepresentation to a finding of probable cause; (2) the misrepresentation was recklessly made about a fact material to a finding of probable cause; or (3) the misrepresentation was negligently made about a fact material to a finding of probable cause.

The second approach is that taken by decisions in the Fourth, Sixth, Seventh and Eighth Circuits. *United States* v. *Lee,* 540 F. 2d 1205, 1208-1209 (4th Cir. 1976); *United States* v. *Luna,* 525 F. 2d 4, 8-9 (6th Cir. 1975) recently followed in *United States* v. *Rosenbarger,* 536 F. 2d 715, 720 (6th Cir. 1976); *United States* v. *Carmichael,* 489 F. 2d 983, 988-989 (7th Cir. 1973) [but

see *United States* v. *Bridges,* 499 F. 2d 179, 184-185 (7th Cir. 1974)]; *United States* v. *Marihart,* 492 F. 2d 897, 899-900 (8th Cir. 1974), recently followed in *United States* v. *Lucion,* 518 F. 2d 298, 301 (8th Cir. 1975). These decisions, led by *United States* v. *Carmichael, supra,* basically hold that a search warrant affidavit will be invalidated where (1) the misrepresentation was intentionally made regardless of the materiality of the misrepresentation to a finding of probable cause; or (2) the misrepresentation was recklessly made about a fact material to a finding of probable cause.

The third approach is represented by those courts which have only partially confronted the issue and thus have not ruled on all of the various types of misrepresentations. Found here are decisions in the First, Second, Third and Ninth Circuits, and they all agree to the extent that certain misrepresentations will invalidate the search warrant affidavit. *United States* v. *Belculfine,* 508 F. 2d 58, 62-63 (1st Cir. 1974), deciding at least that any intentional misstatement will warrant suppression of evidence; *United States* v. *Gonzales,* 488 F. 2d 833, 837-838 (2d Cir. 1973), stating but not deciding that any material misstatement should invalidate a search warrant; *United States* v. *Armocida,* 515 F. 2d 29, 41-42 (3d Cir. 1975), recently cited in *United States* v. *Vento,* 533 F. 2d 838, 858-859 (3d Cir. 1976), recognizing both approaches but not needing to choose between them because the case before the court dealt with unintentional, immaterial misstatements.

State Courts also differ in their handling of the matter of misrepresentations and misstatements in search warrant affidavits. A sampling of state decisions reveals that some states merely delete the misstatement from the affidavit and uphold the search if the affidavit is sufficient without these misstatements. *State* v. *Raboy,* 540 P. 2d 712, 716 (Ariz. App. 1975), *State* v. *Moses,* 537 P. 2d 1363, 1366 (Ariz. App. 1975), holding that intentional or reckless misstatements will be stricken; *People* v. *Ellis,* 539 P. 2d 132, 135 (Colo. 1975), holding that intentional misstatements will be stricken; *State* v. *Nanoff,* 502 P. 2d 1138, 1140 (Mont. 1972), erroneous information in affidavit will be stricken. Other states, however, will automatically invalidate the search warrant upon the finding of intentional misrepresentation, regardless of whether the affidavit is sufficient without the misrepresentation. *People* v. *Callahan,* 381 N.Y.S. 2d 639 (N.Y. 1976), holding that intentional misrepresentation requires suppression of evidence seized under warrant; *Commonwealth* v. *D'Angelo,* 263 A. 2d 441, 444 (Pa. 1970), cited with approval in *Commonwealth* v. *Monte,* 329 A. 2d 836, 842-843 (Pa. 1974), holding that intentional misrepresentation will invalidate the entire warrant; *State* v. *Goodlow,* 523 P. 2d 1204, 1206 (Wash. 1974), adopting the approach presented in the decision of *United States* v. *Carmichael,* 489 F. 2d 983 (7th Cir. 1973), which requires invalidating an affidavit containing either intentional misrepresentations or reckless material misrepresentations.

From these it should be clear that numerous different approaches are being taken with regard to this Fourth Amendment problem. A decision by this court could clarify what the Fourth Amendment requires in this regard and could also point out which method of handling misrepresentations in search warrant affidavits would best serve the deterrent purpose of the exclusionary rule. The facts of this case present an excellent opportunity for a review that would greatly enhance the proper administration of criminal justice.

3. A Decision By This Court Could Clarify What Constitutes Fair and Proper Argument By the Prosecutor in a Criminal Case.

During his closing argument in this case, the prosecutor made numerous improper and prejudicial statements which deprived Petitioner of his right to a fair trial based on the evidence presented. These statements included: (1) arguments calculated to appeal to the prejudices of the jury by labeling the Petitioner as an outsider from the city who was trying to make fools of these country people, where the prosecutor said: "The Louisville Police put some heat on Robinson and he left Jefferson County. He came to Henry County. He came out here and was going to fool these poor Henry County people. . . . So, he came up here and set up and he ran awhile. We finally caught him. Don't let him make a fool out of us like he has tried to do here today." [T.E., Vol. V, pp. 705-706]; (2) arguments injecting extraneous and improper issues not in evidence into the trial by implying that witnesses had

been or would be threatened by the Petitioner and for that reason one of them was participating in a Federal program for the relocation of government witnesses where the prosecutor stated: "Peter Outlaw was intimidated. He was thinking, that could have been a bomb or a case of dynamite or anything else on his floor. What kind of people are you dealing with?" [T.E., Vol. V, p. 707] and continues stating: "All I want you to remember is I have got a witness and you have heard him. He is under the protection of the Federal Government. Being protected." [T.E., Vol. V, p. 709] and again stating "And Kruer is a man that is going to make his own prison. In fact, he has made it. Brian Kruer is under guard. He don't start a car without looking under the hood. He don't walk around the corner without somebody looking." [T.E., Vol. V, p. 716]; (3) arguments including expressions of personal belief where the prosecutor spoke of the chief prosecution witness stating: "Kruer is a thief. He took the stand and told you he was a thief. Kruer told you the truth from that stand. I hope you realize it and understand it." [T.E., Vol. V, p. 714] and continuing "I don't know what the differences between Kruer and between Robinson but Kruer is not on trial here today. The only thing you remember is the testimony that he gave from that stand and I think he told us the truth." [T.E., Vol. V, p. 715].

This court has not ruled on improper prosecutorial argument since *Berger* v. *United States,* 295 U. S. 78, 84-89 (1935) where it spoke in general terms of the prosecuting attorney as a "representative not of an

ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." The Court here continued, describing the role of the prosecutor:

> . . . he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger* v. *United States, supra,* 295 U. S. at 88.

While it cannot be denied that this is all very true, these statements render very little guidance as to where to draw the line between proper and improper prosecutorial argument. All too often a zeal for conviction has made this inquiry necessary and therefore certain boundaries need be imposed in terms more specific than those in *Berger.* In this regard, Federal Circuit Courts of Appeal, citing *Berger,* have fashioned rules of their own, but their treatment of the matter has varied and thus leaves little certainty as to result and has little deterrent effect on prosecutors. The Eighth Circuit in *United States* v. *Splain,* 545 F. 2d 1131, 1134-1136 (8th Cir. 1976) found error (though not reversible error) in the prosecutor's improper characterizations of defendant and in his expressions of personal belief

about evidence. The Court in *United States* v. *Leon,* 534 F. 2d 667, 678-683 (6th Cir. 1976) reversed a conviction due to prosecutorial misconduct involving the injection of inadmissible and irrelevant information as did the court in *United States* v. *Bell,* 506 F. 2d 207, 225-226 (D.C. Cir. 1974). Another conviction was reversed in *United States* v. *Phillips,* 527 F. 2d 1021, 1022-1025 (7th Cir. 1975) due to prosecutorial misconduct involving misstatement of the law, injection of improper information and assertion of personal belief about evidence. Finally in *Hall* v. *United States,* 419 F. 2d 582, 583-588 (5th Cir. 1969) the Court found that comments by the prosecutor involving assertions that the defendant was tampering with witnesses, expressions of personal belief about testimony, and criminal characterizations of the defendant were all highly improper.

The Kentucky case of *Goff* v. *Commonwealth,* Ky., 44 S. W. 2d 306 (1931) reads similar to *Berger* v. *United States, supra.* Here the Court in general terms recited the role of the prosecutor, stating,

> . . . An attorney for the Commonwealth should never forget his high position; should never forget it is his duty to prosecute the guilty. He represents all the people of the Commonwealth, including the defendant; he should in an honorable way use every power that he has, if convinced of the defendant's guilt, to serve his conviction, but he should always remember he stands before the jury clad in the official raiment of the Commonwealth, and should never become a partisan. *Goff* v. *Commonwealth, supra,* 44 S. W. 2d at 308.

Again these statements, like those in *Berger,* are true, but they do not readily translate into a usable guide for determining the propriety of prosecutorial argument. While there cannot be black and white limits in this regard, there do exist standards which, if given sanction by this court, may offer considerable guidance in the future. *The American Bar Association Standards for Criminal Justice Relating to the Prosecution Function* are quite helpful in this area. Standard 5.8, "Argument to the Jury" provides:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to mistate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

Adoption of standards such as these would go a long way toward eliminating the uncertainty in this area.

Such standards would also help eliminate the kind of argument found in this case which tends to try a defendant not on evidence properly presented but on emotions improperly aroused.

The errors complained of here were properly preserved at trial by objection and motion for a mistrial. Counsel for the Petitioner at trial objected during the argument. At the close of argument counsel stated to the Court, "I move at this time for a mistrial, Judge. I believe the Commonwealth Attorney in his closing argument in his zealousness for a conviction has gone outside the record. . . . He injected into the closing arguments threats against Peter Outlaw. He even suggested to the jury that there might be threats against them because of their threat to the justice, etc. . . . For those reasons and the comment outside of the testimony heard for the inflammatory and prejudicial remarks, I move for a mistrial." [T.E., Vol. V, pp. 723-724.] Thus, the facts of this case provide an excellent opportunity for this Court to reverse a conviction unjustly obtained and to offer much needed guidance with regard to proper prosecutorial argument.

CONCLUSION

For the reason that the Supreme Court of Kentucky has failed to properly evaluate both the constitutionality of the search in this case and the propriety of the closing argument of the prosecutor in this case, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

RENDERED: FEBRUARY 18, 1977

76-204

RANDALL ROBINSON - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henry Circuit Court
Hon. George F. Williamson, Judge
Indictment No. 19-CR-75

OPINION OF THE COURT BY JUSTICE PALMORE—AFFIRMING

The question of most importance in this case is whether evidence procured under a search warrant should have been excluded because the affidavit pursuant to which the warrant was issued contained an erroneous statement of fact.

The affidavit was prepared by the Commonwealth's Attorney for Henry County and executed by an officer of the Kentucky State Police. It stated, among other things, that the affiant had received from the Louisville Police Department and an unnamed informant advise to the effect that a large quantity of stolen property was in the appellant's possession at his home in Henry County. The portion of the affidavit claimed to have been untrue is as follows:

"Said informant having been proven reliable by having previously given the Louisville Police Department who has advised the affiant information leading to the arrest and conviction of persons for the commission of other crimes."

As later disclosed, the informant mentioned in the affidavit had been an accomplice of the appellant in that the stealing and delivery of the property to the appellant's home had been carried out by prearrangement between them. The accomplice became a principal witness against the appellant both in the preliminary hearing (examining trial) held by the Quarterly Court and in the circuit court trial. At the examining trial he testified that this was the first time he had ever acted as a police informant.

The fundamental purpose of requiring an affidavit in support of a search warrant is to protect persons and their property from searches that are not founded on probable cause. Though in some jurisdictions the determination of probable cause is not confined to the affidavit, from time immemorial it has been the rule in this state that it is. Bowen v. Commonwealth, 199 Ky. 400, 251 S. W. 625 (1923); Caslin v. Commonwealth, Ky., 491 S. W. 2d 832, 834 (1973). We are not at all convinced that the rule is unsound.

It is likely that the alleged misstatement in the affidavit was an honest mistake. The officer who made it was not called to testify, nor was the Commonwealth's Attorney who had prepared it. It appears from the face of the affidavit, however, that in the course of a thorough investigation of the case the officer had received a good deal of information from the Louisville Police Department. In due course, after gathering further details, he took his information to the Commonwealth's Attorney, who paraphrased it in the form of an affidavit. It is not unnatural that in this process of telling and retelling, inaccuracies would develop. We do not say that there will never be an instance in which this court will hold a search warrant invalid by reason of a clear

and deliberate perjury in the supporting affidavit, but we have no reason to believe that this is such a case.

There is still another reason why the warrant should not have been quashed. The affidavit contained more than three legal-size pages of information. The officer's cause for believing that the stolen property was on the appellant's premises was not confined to what he had heard that the informant had told the Louisville police. Among other things disclosed by the affidavit, the place had been under surveillance, and the officer had seen "pictures of the stolen property in the barns and home above described," etc. From a stem-to-stern reading of the affidavit it is our opinion that it would have provided probable cause for the warrant without the details attributed to the informant.

Appellant attacks the warrant on the further ground that the affidavit contained "hearsay on hearsay." Whether the affidavit supporting a search warrant does or does not furnish probable cause need not be determined by rules of evidence designed for trials. The criterion is whether on the whole the affidavit shows reasonable grounds for believing that the property sought to be discovered is actually on the premises to be searched. Cf. Commonwealth v. Eilers, Ky., 503 S. W. 2d 724, 726 (1974).

Appellant's contention that the county judge who issued the warrant did so without reading it is not supported by the record. Testifying at a pretrial conference the judge said that he "looked at the affidavit" and questioned the affiant "along the lines of what the affidavit, what he had stated in the affidavit." That he interrogated the police officer and also discussed the matter with the Commonwealth's Attorney by telephone does not connote that he did not read the affidavit. He was never asked and did not say whether in fact he had read it. On the basis of this record we certainly cannot assume that he did not.

During the course of the Commonwealth's closing address to the jury the appellant objected to a comment

relating to the strange reappearance of a stolen camera in the owner's locked apartment. The objection was sustained, counsel requested an admonition, and the admonition was given. He did not move for any further relief and therefore is not in a position to claim that a mistrial should have been declared. Humphrey v. Commonwealth, Ky., 442 S. W. 2d 599, 601 (1969). Other objections to remarks made by the prosecutor were not sufficiently preserved for review. Cf. Johnson v. Commonwealth, Ky., 505 S. W. 2d 470, 471 (1974); Mahan v. Commonwealth, Ky., 286 S. W. 2d 93, 94 (1956); May v. Commonwealth, 153 Ky. 141, 154 S. W. 1074, 1080 (1913).

Appellant is correct in contending that Russell v. Commonwealth, Ky., 403 S. W. 2d 694, 696 (1966), holding that the thief is not an accomplice of the receiver of stolen goods, is not applicable to this case. On the other hand, it was held in Spencer v. Commonwealth, Ky., 467 S. W. 2d 128, 130 (1971), and Sarver v. Commonwealth, Ky., 425 S. W. 2d 565, 566 (1968), that discovery of the stolen property in the defendant's possession is sufficient corroboration to obviate the necessity for an accomplice instruction.

The judgment is affirmed.

All concur.

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APPENDIX B

SUPREME COURT OF KENTUCKY

OPINION RENDERED: FEBRUARY 18, 1977

RANDALL ROBINSON
v.
COMMONWEALTH OF KENTUCKY
} File No. 76-204

Appeal from Henry Circuit Court
Action No. 19-CR-75

MANDATE—Issued June 10, 1977

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

June 10, 1977 Appellant's Petition for Rehearing Denied.

(c) Martha Layne Collins
Clerk

APPENDIX C

HENRY QUARTERLY COURT

COMMONWEALTH OF KENTUCKY, - - - *Plaintiff,*

v.

RANDALL ROBINSON, - - - - - *Defendant.*

AFFIDAVIT FOR SEARCH WARRANT—
Filed November 14, 1974

Before me, Roy P. Smith, Judge of the Henry County Quarterly Court, Commonwealth of Kentucky, personally appeared Terry Gray, an officer with the Kentucky State Police hereafter called the affiant and who first being duly sworn does hereby depose and state as follows:

(1) This affidavit is made in the performance of the duties of the affiant as an officer with the Kentucky State Police. In the course of the performance of his duties he has worked with other State and Federal officers in the investigation and theft of automobiles, farm equipment, trucks, parts and accessories belonging thereto and therefrom, and false and forged registration papers, said items having been stolen in various counties of the Commonwealth of Kentucky and now located in buildings or motor vehicles on the property hereafter described.

(2) This affiant has received information from the Louisville Police Department and their informer who has advised the affiant to the effect that the property hereafter described and persons hereafter named now have in their possession stolen property consisting of automobiles, farm

equipment, trucks, parts and accessories belonging thereto and therefrom, and false and forged registration papers. Said informant having been proven reliable by having previously given the Louisville Police Department who has advised the affiant information leading to the arrest and conviction of persons for the commission of other crimes.

(3) The affiant as a police officer received information that a semi-trailer load of automobile parts was stolen in Louisville, Jefferson County, Kentucky on or about September 30, 1974, from NAPA Distribution Center, Motor Parts Depot Division, 211 E. College Street, Louisville, Kentucky. That said stolen automobile parts are now in a silver-white colored semi-trailer located on the property hereafter decribed and the affiant has been advised by the Louisville Police Department which in turn have been advised by the informant that the stolen parts are now in this semi-trailer on the property hereafter described.

(4) The affiant with other officers has had the semi-trailer and the property on which it is located under surveillance for a period of time. He has seen the semi-trailer on Friday, November 8, 1974. Information given to the affiant by the Louisville Police Department which in turn have been advised by the informant was received by the affiant on November 8, 1974. The affiant states that the semi-trailer full of stolen parts is now on the hereafter described property at this time by reason of the information from the Louisville Police Department which in turn received their information from the informant, his surveillance of the premises and other information received by him from other law enforcement officers.

(5) The property on which and in which the stolen goods are kept is described as follows:

> Being the property consisting of a house and lot now occupied by the accused Randall Robinson, being located on the East side of Kentucky Highway 153 across

the road from Tipton's Grocery Store and said property consisting of a large two story white frame residence; Silver-white semi-trailer parked on the side of the drive at the rear of the house; a mobile home parked on the left hand side of the drive as you enter the property, said mobile home being white with colored trim and located in front of the residence previously described; also to search a large dairy barn located at the end of a drive servicing that property. The silo, outbuildings and milking parlor and all other outbuildings connected or adjacent to said barn located behind the house previously described. There also being located on the property several outbuildings between the house and barn and behind the house it should be searched; also to be searched is a second barn located on the same drive or road above described and behind the first barn and all buildings and connections adjacent to said barn; a third barn also located on the above described property and behind the first two barns above described being a tobacco barn. In addition all motor vehicles, trucks, building and appurtenances thereto.

All of the above information having been received by the affiant on the date of November 8, 1974, from the Louisville Police Department and from the informant previously described. Affiant has seen the van and has seen pictures of the stolen property in the barns and house above described all on November 8, 1974, between the hours of 7:00 A.M. and 8:00 P.M., EST.

On the basis of probable cause above described affiant believes that the above listed property consisting of parts and accessories for motor vehicles; stolen motor vehicles; forged motor vehicle registration papers, farm equipment, and a typewriter used for the preparation of forged motor

vehicle registration papers are all located on the above described property.

WHEREFORE, affiant prays that a search warrant be issued according to the laws in such cases made and provided commanding the State Police, Louisville Police Department, Jefferson County Police Department, or any other federal or state officer to search the afore-described premises, including barns, houses, outbuildings and automobiles and residence, and seize as evidence all stolen property above described.

(s) Terry L. Gray
Affiant

STATE OF KENTUCKY
COUNTY OF HENRY } ss

Subscribed and sworn to before me by Terry Gray as being a true and correct statement of the facts therein contained as he verily believes.

Dated this November 8, 1974.

(s) Ray C. Smith
Judge, Henry Quarterly Court

APPENDIX D

HENRY QUARTERLY COURT

COMMONWEALTH OF KENTUCKY, - - - *Plaintiff,*

v.

RANDALL ROBINSON, - - - - - *Defendant.*

SEARCH WARRANT

TO ANY SHERIFF, CONSTABLE, STATE POLICEMAN, OR POLICE OFFICER OF THE STATE OF KENTUCKY; CITY OF LOUISVILLE AND JEFFERSON COUNTY POLICE OFFICER:

You are commanded forthwith to search the following grounds and buildings:

Being the property consisting of a house and lot now occupied by the accused Randall Robinson, being located on the East side of Kentucky Highway 153 across the road from Tipton's Grocery Store and said property consisting of a large two story white frame residence; silver-white semi-trailer parked on the side of the drive at the rear of the house; a mobile home parked on the left hand side of the drive as you enter the property, said mobile home being white with colored trim and located in front of the residence previously described; also to search a large dairy barn located at the end of a drive servicing that property. The silo, outbuildings and milking parlor and all other outbuildings connected or adjacent to said barn located behind the house previously described. There also being located on the property several outbuildings between the house and barn and behind the house it should be searched; also to be searched is a second barn located on the same drive or road above described and behind the first barn and all buildings and connections adjacent to said barn; a third barn also located on the above described property and behind the first two barns above described being a tobacco barn. In addition all motor vehicles, trucks, building and appurtenances thereto.

If you find any parts and accessories for motor vehicles; motor vehicles; forged motor vehicle registration papers; stolen driver license blank forms; other official forms of the Commonwealth of Kentucky; farm trucks; farm equipment; burglary tools or other tools and equipment commonly used for breaking and entering of buildings; a typewriter and other printing equipment used for the preparation of forged motor vehicle registration papers or driver licenses, you will immediately take possession thereof, together with the body of the person or persons, that may appear to be in possession thereof and deliver them to me at my office as speedily as possible.

Given under my hand as Judge of the Henry Quarterly Court, this November 8, 1974.

(s) Ray C. Smith
Judge, Henry Quarterly Court